UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOLKSWAGEN GROUP OF AMERICA, INC	)	
	)	
Employer,	)	
	)	
	)	**CASE NO. 10-RC-162530**
and	)	
	)	
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	)	
UNITED AUTO WORKERS, LOCAL 42	)	
	)	
Petitioner.	)	

PETITIONER'S STATEMENT IN OPPOSITION
TO EMPLOYER'S REQUEST FOR REVIEW

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COMES NOW, Petitioner United Auto Workers, Local 42 (the "Union" or "Local 42"), pursuant to Section 102.67(f) of the NLRB's Rules and Regulations, and hereby submits its Statement in Opposition to the Request for Review filed by Volkswagen Group of America, Inc. (the "Employer") in the above-referenced matter. The Board should dismiss the Request for Review expeditiously, since it raises no grounds warranting review. This case plows no new policy ground and raises no new or controversial questions, despite the entrance of amici into the fray. Instead, this is a simple case involving a unit of skilled trades employees that is of a type that the Board has for decades found appropriate. We ask the Board to therefore promptly deny the Request for Review so that collective bargaining - something which these Volkswagen employees have long sought - can begin.[1]

I. Introduction

By a Decision dated November 18, 2015, the Regional Director for NLRB Region 10 found a unit of all full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, to constitute an appropriate unit. An election was held over two days on December 3 and 4, 2015. The Union prevailed in the election by a vote of 108 to 44. There was one void ballot. The Regional Director for NLRB Region 10 issued a Certification of Representation on December 15, 2015. The Employer filed its Request for Review on December

[1] By filing this opposition to the Employer's Request for Review pursuant to Section 102.67(f) of the Board's Rules and Regulations, the Union does not waive, but instead respectfully reserves, its right to file such further papers as may be permitted under Section 102.67(h) of the Board's Rules and Regulations should - contrary to the Union's request above - Review be granted. Further, the Union at this time takes no position on the Amici's motion filed in this case and does not address their arguments since the motion for leave to file has not been granted as of the date of this filing, reserving all rights to file such further papers as may be permitted under Section 102.67(h) of the Board's Rules and Regulations or otherwise should the motion for leave to file be granted.

23, 2015, arguing that the petitioned-for unit is not an appropriate unit, and that production employees share an overwhelming community of interest with the maintenance employees.

The Union submits that the Employer's Request for Review should be denied because the Employer fails to provide a compelling reason for the grant thereof, as required by Section 102.67(d). Moreover, the Board has routinely denied Requests for Reviews of Directions of Elections in maintenance only units with facts similar to this case.

As the Regional Director correctly found in his Decision and Direction of Election, maintenance employees at the Employer's Chattanooga facility are a readily identifiable group and share a community of interest under the Board's traditional criteria. (DD&E at 20-21). Moreover, the Regional Director correctly found that the production employees do not share an overwhelming community of interest with the maintenance employees, applying *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). (DD&E at 21-23). The Union submits that the Regional Director's findings are supported by the record evidence and therefore the Employer's Request for Review is meritless. It is clear that the maintenance employees at the Chattanooga plant are a separate and distinct group and share a community of interest, because maintenance employees have heightened job skills compared to production employees; have their own job titles; do not perform any production work; receive more specialized training; are required to have specific technical experience before being hired; are paid higher wages; work different hours; wear different clothing and uniforms; have access to tools, equipment, work areas that are not accessible to production employees; are supervised separately; attend separate meetings; take their breaks and lunch at different times and in different areas; have a separate HR representative; are assigned company email addresses, unlike

production employees; and have access to company computers that are not available to production employees. "[A]fter there has been a showing that the petition describes employees who are readily identifiable as a group and share a community of interest, the Board can and should find the proposed unit to be an appropriate unit unless an opposing party proves otherwise." *Specialty Healthcare*, 357 NLRB at * 12 fn. 28.

Furthermore, under the Board's pre-*Specialty Healthcare* precedent, maintenance-only units were routinely found appropriate so long as the employees in the petitioned-for unit shared a community of interest, and the facts demonstrated the absence of a "more comprehensive bargaining history." *American Cyanamid Co*., 131 NLRB 909 (1961). The Union submits that the petitioned-for unit in this matter satisfies both factors and thus is appropriate under long-standing precedent.

Finally, although the Employer does not make the argument in its Request for Review that the petitioned-for unit is a fractured unit, it clearly is not. The unit includes all maintenance employees at the Employer's Chattanooga facility, and, there clearly is a rational basis for a maintenance-only unit based on such factors as their skill levels, training, functions, job classifications, and working hours distinct from the production employees.

II. Statement of facts

The Employer's Chattanooga plant is divided into three major departments: assembly, body, and paint. (Er Ex. 2). Both production and maintenance employees are assigned to work in one of these departments. Maintenance employees have unique job titles. Maintenance employees are known as Skilled Team Members and maintenance leads are called Skilled Team Leaders. Production employees on the other hand are called Team Members and the leads are called Team Leaders. (Tr. 50). The primary responsibility of the production employees is to

install and assemble the parts necessary to complete automobiles while the primary responsibility of maintenance employees is to repair and perform preventative maintenance on machinery and robots. *Id.*

The job functions of Skilled Team Members are completely different than those of Team Members. Skilled Team Members perform preventative maintenance and conduct as-needed repairs on extremely sophisticated pieces of equipment in the plant. The daily job functions of Skilled Team Members vary depending on what equipment needs repair. (Tr. 206). Team Members, on the other hand, perform a particular pre-determined task continually throughout the day. Team Member job duties do not fluctuate, they perform the same task day in and day out. (Tr. 340).

The experience needed to be hired into a maintenance position greatly exceeds the experience required for a production position. To work in maintenance, workers must have experience and demonstrated proficiency in skilled trades, such as electrical and mechanical work. (U Ex. 4A; Tr. 144-46). Team Members, on the other hand, are not required to have any specialized experience. (Tr. 314).

Skilled Team Members and Skilled Team Leaders have different pay scales than Team Members and Team Leaders. (Er Ex. 6 at 76). Maintenance employees earn a higher hourly rate, with a higher starting hourly rate, and a higher maximum hourly rate. *Id.*

In all three shops, production employees work the same schedule. They all work Monday through Thursday on one of two ten-hour shifts: 6 a.m. to 4:45 p.m. or 6 p.m. to 4:45 a.m. In each shop, production employees are divided into two teams: the red team and the white team. The teams rotate every week so that each team works the early shift one week and the late shift the next. (U Ex. 2).

Maintenance employees on the other hand work around the clock. In the body and paint shops, maintenance employees work 12.5 hour shifts beginning either at 7 a.m. or 7 p.m. They are divided into four different shift teams: red, white, blue and silver. These teams rotate in order to staff the departments around the clock, seven days a week. Maintenance employees in the assembly shop work one of three 8-hour shifts with start times of 12:00 a.m., 8 a.m., and 4 p.m., Monday through Friday. *Id.*

Production workers are sometimes released early from their shifts. (Tr. 272). Maintenance employees are never released early. *Id.* Moreover, there are shutdown days in the plant where normal production does not run. (Tr. 320-21). Maintenance employees work during shutdown days and shutdown weeks. *Id.* PTO is approved separately for maintenance and production workers in each shop. Neither production or maintenance employees will be approved for PTO if ten percent of their particular team is already scheduled to be out. (Tr. 284, 323).

Production workers in each department have common scheduled break and lunch periods that they all adhere to, whereas maintenance employees' breaks are scheduled so that they are working while production employees are on break. (Tr. 184). Maintenance employees never take breaks and lunch at the same time as production employees. *Id.* Production employees normally take their scheduled lunch in the cafeteria, and no maintenance employees take their lunch in the cafeteria during that time. *Id.* In each of the shops, production and maintenance employees have separate break rooms, and the record evidence shows that maintenance employees take their breaks in their own break rooms, and production employees take their breaks in their own break rooms (Tr. 226, 282).

All employees have a meeting with their supervisor at the start of their shift. Production employees in each department meet separately from the maintenance employees in the department. (Tr. 280, 329). Skilled Team Members also have their own direct supervision. (U Ex. 1, 5; Er Ex. 3). Each shift within maintenance has a supervisor who supervises only maintenance employees. (Tr. 216, 269). All of Skilled Team Members' daily supervision comes from supervisors who supervise only maintenance employees. (Tr. 274) Maintenance supervisors conduct the maintenance employees' annual evaluations and approve their leave requests. (Tr. 273-74). Simply put, maintenance and production employees share no common daily supervision.

There is no temporary interchange among maintenance and production employees (Tr. 139, 140, 195, 265). Maintenance employees do not fill-in for production employees, and production employees do not fill-in for maintenance employees. *Id*. There is no evidence in the record of production employees performing maintenance work, or vice versa.

The record evidence also shows that maintenance employees have a separate HR representative. (Tr. 161). Also, the record shows that at least two of the three departments, paint and assembly, have separate maintenance organizational charts posted in the departments. (U Ex. 1, 5).

Maintenance employees are required to undergo more specialized and technical training than production employees. (Tr. 141-42). The Employer's handbook provides that once employed, skilled team members can transfer from one department to another. (E Ex. 5 at 97).

Maintenance employees have access to equipment that is not accessible to production employees. There are several fenced-in or partitioned maintenance areas in all three shops where maintenance employees store tools and work on equipment. (Tr. 220-21). Production employees

do not have keys or access to any locked toolboxes or areas. (Tr. 221). If a maintenance employee needs a part or tool that is not available in the maintenance area of the shop, the employee can procure it from the general store. Production employees have access to items like gloves and towels, which are available from the general store, but only maintenance employees with a work order have access to repair parts. (Tr. 222).

Production and maintenance employees wear "team wear" purchased from the company store. When employees enter the company store they are asked whether they work production or maintenance and in what department and then are instructed on what particular clothing is available for that area. (Tr. 275, 326). All maintenance employees are required to wear 100% cotton pants and shirts to prevent their clothing from catching fire in the event of an arc flash. (Tr. 275). Production employees are not required to wear 100% cotton clothing. (Tr. 275-76). Maintenance employees must also wear special safety rated boots. (Tr. 307). These boots are specifically designated for maintenance employees in the company store. Maintenance employees wear black caps and production employees wear gray (Tr. 307). Production employees in the paint shop wear silver coveralls and maintenance employees wear green (Tr. 276, 345). All maintenance employees carry radios. (Tr. 307). In production, only team leads carry radios. All maintenance employees are assigned a lock and carry it with them while they work. (Tr. 137). Maintenance employees are assigned a company e-mail address when they are hired. (Tr. 231) They also have a user name and password to log into the Employer's computer system on terminals throughout the plant. Production employees are not assigned an e-mail address and they only have access to the Employer's computer system through limited-use kiosks. (Tr. 333).

III. Discussion

a. The Employer's Request for Review should be denied because the Employer failed to demonstrate a compelling reason for the grant thereof

Under Section 102.67(d) of the NLRB's Rules and Regulations, "The Board will grant a request for review only where compelling reasons exist therefor." The Rules provide four grounds for granting such a request:

> (1) That a substantial question of law or policy is raised because of:
>
> (i) The absence of; or
>
> (ii) A departure from, officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Union submits that the Employer failed to demonstrate any of the foregoing grounds for review, and therefore its request for review should be denied. First, the Employer's Request for Review of the Regional Director's DD&E does not raise a substantial question of law or policy because the DD&E does not depart from officially reported Board precedent. In fact, the DD&E correctly applied *Specialty Healthcare* and found that the maintenance employees at the Chattanooga plant constitute an appropriate unit and that they do not share an overwhelming community of interest with the production employees. (DD&E at 21-23). Moreover, the application of *Specialty Healthcare* to maintenance-only units has been upheld by the Board on numerous occasions. *See Nestle Dryer's Ice Cream*, Case 31-RC-066625, 2011 WL 6835227 (NLRB December 28, 2011) (denying Nestle's request for review); *Nestle Purina Petcare*

Company, 14-RC-145222, 2015 WL 1326158 (NLRB March 24, 2015) (denying Nestle's request for review).

Furthermore, as discussed in detail below, for decades prior to *Specialty Healthcare*, the Board found maintenance-only units to be appropriate. *See American Cyanamid Co.*, 131 NLRB 909 (1961); *Ore-Ida Foods, Inc*., 313 NLRB 1016 (1994); *Capri Sun, Inc*., 330 NLRB 1124 (2000); *Sundor Brands, Inc.*, 334 NLRB 755 (2001); *Yuengling Brewing Company*, 333 NLRB 892 (2001). The Union submits that the petitioned-for unit in this case is appropriate under both *Specialty Healthcare* and these prior and longstanding Board precedents. Thus, the Employer's Request for Review raises no substantial question of law or policy because under well-established Board law, maintenance employees are routinely found to be an appropriate unit.

Next, the Employer fails to cite any ruling by the Hearing Officer on a factual issue that is clearly erroneous or is prejudicial to its rights. Moreover, the Employer fails to allege that any conduct at the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error. Thus, the Employer fails to satisfy either the second or third ground for granting a request for review.

Finally, the Employer fails to demonstrate that there are compelling reasons for reconsideration of an important Board rule or policy. While the Employer argues that *Specialty Healthcare* was wrongly decided, it fails to provide any persuasive basis in support of that argument. As stated, the Board has repeatedly denied requests for review of decisions applying *Specialty Healthcare* to maintenance-only units. Moreover, *Specialty Healthcare* was affirmed by the 6th Circuit - which has jurisdiction over Chattanooga, Tennessee. Furthermore, the Board has applied *Specialty Healthcare* to non-health care employers. *See e.g. Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011); *Macy's*, 361 NLRB No. 4 (2014); *DPI Secuprint*,

Inc., 362 NLRB No. 172 (2015). Since the Employer has failed to demonstrate that there are compelling reasons for reconsideration of the *Specialty Healthcare* decision upon which the DD&E in the instant matter is based, the Employer fails to satisfy the fourth ground for a request for a review. And even if the Employer had done so, this case would be a wholly inappropriate vehicle for reconsideration of *Specialty Healthcare* given the longstanding Board precedents upholding maintenance units as appropriate, precedents that provide a clear and independent basis for upholding the unit determination here.

Based on the foregoing, the Employer has failed to show a compelling reason for its Request for Review under Section 102.67(d), and therefore Local 42 respectfully submits that it should be denied.

b. The Regional Director correctly found that maintenance employees at the Chattanooga plant constitute an appropriate unit under *Specialty Healthcare* because they are readily identifiable as a group, share a community of interest, and do not share an overwhelming community of interest with production employees

In unit determination questions, the Board first considers the union's petition and whether that unit is appropriate. *Boeing Co.*, 337 NLRB 152, 153 (2001); P. *J. Dick Contracting*, 290 NLRB 150, 151 (1988). It is well settled that the Board requires a union to seek not the most appropriate or comprehensive unit, but only an appropriate unit. *Overnite Transportation Co.*, 322 NLRB 347 (1996). The Supreme Court has held that "employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991) (emphasis in original). Citing this passage, the Board has held that "[a] union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer," so long as the unit sought is appropriate. *Overnite Transportation Co*., 322 NLRB 723, 723 (1996). Indeed, "the Board

generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co.,* 334 NLRB 484, 484 (2001). "In determining whether a sufficient separate community of interest exists, the Board examines such factors as mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." *Capri Sun, Inc.* 330 NLRB 1124 (2000). A petitioner's desire in regard to unit composition and scope is also entitled to significant weight, so long as it is not based on an arbitrary grouping of employees. *International Bedding Co*., 356 NLRB No. 168 (2011).

At the outset, the Regional Director focuses on the unit that has been requested in the petition. Once the Regional Director determines that the maintenance employees constitute an appropriate bargaining unit, no further inquiry is required. *See Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 at * 1 fn. 2 (2010) (explaining that "the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends."); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989) (the Board analyzes the community of interest among the employees in the petitioned-for unit, and where such community of interest is demonstrated, "[its] inquiry ends" even though there may be other units that would be equally or even more appropriate). In *Specialty Healthcare, supra*, the Board set forth the criteria for determining whether the petitioned-for unit of employees is an appropriate unit when a party contends that a larger unit is the only appropriate unit. The Board held that when a unit of employees "are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate

unit … unless employees in the larger unit share an overwhelming community of interest with those in the petitioned for unit." *Id*. at * 12-13. In other words, that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community of interest factors "overlap almost completely." *Id*. at * 16 (*quoting Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)).

1. Maintenance employees at the Chattanooga plant are readily identifiable as a group

The first issue to be addressed under *Specialty Healthcare* is whether the petitioned-for maintenance employees are readily identifiable as a group. In finding that the maintenance employees are readily identifiable as a group, the Regional Director noted that the maintenance employees "share a unique function" (DD&E at 20) (*citing Macy's Inc.,* 361 NLRB No. 4 (2014)). That is, the maintenance employees in the petitioned-for unit perform work that is separate and distinct from the work performed by production employees. The maintenance employees are responsible for keeping the machinery on the production lines running by performing scheduled preventative maintenance as well as repairs. (DD&E at 12-13; Tr. 188). Production employees, on the other hand, only perform production work. (DD&E at 2; Tr. 265). The record demonstrates that there is no temporary interchange among maintenance and production employees. (DD&E at 10; Tr. 139, 140, 195, 265). As the Regional Director correctly found, "only production employees do production work and only maintenance employees perform maintenance work." (DD&E at 10).

In addition, maintenance employees have very different skills and qualifications than the production employees. The record demonstrates that maintenance employees are required to have specialized technical experience before being hired into a skilled trade position. (DD&E at 5-6; Tr. 144). Production employees on the other hand, are not required to have any particular

experience or qualifications. (DD&E at 6; Tr. 314). Moreover, the test maintenance employees are required to perform upon being hired involves technical skills such as wiring, while the test for production workers involves agility but not technical competency. (DD&E at 6; Tr. 204-05, 315, 338). Finally, maintenance employees receive periodic specialized technical training at work such as sealer robot training that production employees do not receive. (DD&E at 14; Tr. 281). Thus, the fact that all maintenance employees are required to possess technical skills and qualifications in order to be hired, and receive special technical training apart from production employees, demonstrates that they are readily identifiable as a group. Moreover, the fact that there is no temporary interchange between maintenance and production employees is further evidence of the maintenance employees' greater skill set. *See Northrop Grumman Shipbuilding Inc*., 357 NLRB No. 163 at * 6 (2011) (absence of interchange attests to unique role of technical classification).

Maintenance employees have unique job classifications. As discussed above, all maintenance employees are classified as either Skilled Team Members or Skilled Team Leaders. (DD&E at 2). No production employees share these job classifications. Instead, production employees are classified as either Team Members or Team Leaders. *Id.* Furthermore, maintenance employees share a uniform. Unlike production employees, all maintenance employees are required to wear 100% cotton clothing and special boots, and maintenance employees in body weld and assembly wear black hats, a different color than the production workers. (DD&E at 13; Tr. 275, 307)

The Employer argues that the Regional Director failed to properly analyze whether the petitioned-for maintenance employees are readily identifiable as a group, but the Employer is incorrect. The Regional Director's decision identifies all of the characteristics unique to

maintenance employees, such as job functions, skills, classifications, training, and uniforms. Following a discussion of all of the aforementioned traits that are unique to maintenance employees, the Regional Director correctly found the maintenance employees are readily identifiable as a result. (DD&E at 10-14, 20). Thus, the Employer's claim that the Regional Director failed to follow *Specialty Healthcare* is not supported by the record in this matter.

2. Maintenance employees share a community of interest

In determining whether a sufficient separate community of interest exists, the Board examines such factors as mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Franklin Mint Corp.*, 254 NLRB 714, 716 (1981). Applying these factors, the Regional Director correctly determined that maintenance employees share a community of interest.

Maintenance employees are paid more than production employees, and this supports a finding that a maintenance-only unit is an appropriate unit. *See Ore-Ida Foods*, 313 NLRB at 1019. All maintenance employees are paid according to the same wage progression. (DD&E at 8; Er. Ex. 6 at 76). There are four separate progressions for production employees, production leads, maintenance employees and maintenance leads. At each level, the hourly rate for maintenance employees is around $7 higher than the rate for production employees. The highest Level 11 production wage rate is $23 per hour, which is the same as the Level 1 rate for maintenance employees. There are similar differences within the wage rates at each level for production leads and maintenance leads and the Level 11 hourly rate for production leads is $24.25, the same as the Level 1 rate for maintenance leads. *Id.*

Maintenance employees share similar hours. Maintenance employees in the body and paint shops work 12.5 hour shifts beginning either at 7 a.m. or 7 p.m, seven days a week. They are divided into four different shifts. Maintenance employees in the assembly shop work one of three 8-hour shifts with start times of 12:00 a.m.; 8 a.m. and 4 p.m., Monday through Friday. (U Ex. 2)

Maintenance employees in each department share common supervision - separate from production employees - reporting directly to the maintenance supervisor, who in turn reports to the maintenance assistant manager. (DD&E at 4-5; Tr. 111). The maintenance supervisors and maintenance assistant managers do not supervise production employees. (Tr. 274). Maintenance supervisors are responsible for approving leave, issuing discipline, and performing an annual evaluation of the maintenance employees. (DD&E at 10; Tr. 273-74). Maintenance employees in each department share a maintenance office and fenced-in work areas where they perform repair work (DD&E at 12-13; Tr. 220-21, 328).

Maintenance and production employees are in contact with each other during the day, but there is no evidence of maintenance employees performing production work, or vice versa. Although rank-and-file production employees can contact maintenance personnel directly if there is a problem on a machine, it is usually maintenance leads or maintenance supervisors who inform maintenance employees that a machine or robot needs to be fixed. (DD&E at 12; Tr. 207). Rather than establish common supervision, these isolated instances "are better characterized merely as identification by production personnel of what repairs are needed to be done by maintenance personnel." *Ore-Ida Foods, Inc.*, 313 NLRB at 1019. Furthermore, the "interaction between the production and the maintenance employees when working together on these functions or discussing problems about the machines" does not mandate a plant-wide unit.

Capri Sun, Inc., 330 NLRB at 1126; *DPI Secuprint, Inc.*, 362 NLRB at * 7 ("contact in the absence of interchange does not establish an overwhelming community of interest").

Finally, as stated above, all maintenance employees are highly skilled and all perform preventative maintenance and repair functions. For all of these reasons, the maintenance employees at the Chattanooga plant share a community of interest under Board law.

Contrary to the Employer's assertion, the Regional Director clearly concluded, based on a thorough analysis of the facts, that the petitioned-for employees share a community of interest. (DD&E at 20-21). Also lacking in merit is the Employer's argument that maintenance employees do not share a community of interest because there is no separate maintenance department at the Chattanooga plant. As shown above, *all* maintenance employees - regardless of the shop - perform repairs and preventative maintenance functions, *all* maintenance employees share the same job classifications - Skilled Team Members and Skilled Team Leaders - and the job classifications are the Employer's classifications, *all* maintenance employees are required to demonstrate their technical proficiency in the skilled trades before being hired, *all* maintenance employee receive specialized training throughout their employment, *all* maintenance employees are paid according to the same wage scale, *all* maintenance employees are required to wear 100% cotton clothing and special boots, *all* maintenance employees carry radios, *all* maintenance employees are assigned company email addresses, *all* maintenance employees have separate hours from the production workers, *all* maintenance employees are required to work while production employees are on break, and *all* maintenance employees are assigned the same human resources representative. Moreover, the Employer handbook provides that maintenance employees can transfer between shops. (Er Ex. 6 at 97 ("Skilled Team Members are allowed to post for other Skilled Team Member positions in *any* production shop") (emphasis added).

Finally, the Employer's own "role summary" for Skilled Team Leaders shows that the Employer groups all of the Skilled Team Leaders together for their job responsibilities. That is, the job responsibilities of Skill Team Leaders are not distinct for each shop. (Er Ex. 5 at 3). The fact that maintenance employees work in separate shops does not override the overwhelming evidence of a clear community of interest among all of the maintenance employees at the Chattanooga plant.

3. The Employer failed to demonstrate that production employees share an overwhelming community of interest with maintenance employees.

The record clearly reflects, and the Regional Director properly found, that the maintenance employees at the Employer's Chattanooga plant are readily identifiable as a separate group of distinct and cohesive employees and that this group shares a community of interest under the Board's traditional community of interest test. Therefore, in order to establish that the petitioned-for maintenance unit is not appropriate, the Employer must establish that the production employees share an overwhelming community of interest with the maintenance employees. *Specialty Healthcare*, 357 NLRB at * 16. The Board has characterized this burden as a "heightened showing." *Id.* Additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude (the) employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Id.* at * 16 (quoting *Blue Man Vegas, LLC. v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). The Union submits that the Regional Director correctly found that the maintenance employees and the production employees at the Chattanooga do not share an overwhelming community of interest. (DD&E at 21-23). As the assembly shop General Manager testified at the RC hearing, "the maintenance team is pretty autonomous. They kind of just carry out their own job functions." (Tr. 193).

The Regional Director correctly relied upon the fact that production and maintenance employees are separately supervised and there is no interchange between the two classifications to conclude that no overwhelming community of interest exists. Also, the skills, experience and training of production and maintenance employees shows that an overwhelming community of interest does not exists. As new employees, maintenance workers are required to possess more experience, qualifications and training. Once employed, they are required to undergo further, more extensive, and more technical, training. Although both production and maintenance employees have an eleven-step wage progression, all maintenance employees are compensated at a wage rate that exceeds the rates paid to production employees. The maintenance employees also work a different schedule than production employees. They are specifically required to be available when production employees are not working, which includes shutdowns. While production employees can be released early from their shifts, maintenance employees are never released early. Moreover, maintenance employees have their own human resources manager. (DD&E at 21).

The Regional Director also correctly found that production and maintenance employees have separate meetings at the beginning of their shifts and their attendance is maintained separately. Although maintenance employees perform some of their work on the production floor, they have separate work and break areas which are not accessible to production employees. Production employees do not have access to the same tools, parts and equipment as maintenance employees. While all hourly employees are required to wear "team wear" from the company store, the attire requirements for maintenance employees are significantly different. Maintenance employees are also distinguishable from production employees by the black hats they wear in the plant. Moreover, all maintenance employees carry radios, while in production, only leads carry

them. All maintenance employees are assigned a company e-mail address and can access the Employer's computer system through an assigned login and password. Except in very limited circumstances, production employees do not share access to the computer system (DD&E at 21-22).

Given the substantial differences between maintenance and production employees (including duties, experience, skills, interchange, direct supervision, and pay), it is clear that the Employer cannot carry its burden to show that the maintenance and production employees share an overwhelming community of interest. By contrast, the commonalities highlighted by the Employer - common benefits and personnel policies - are not sufficient to show that there is "no rational basis" to a unit of all maintenance employees, and therefore the Employer's Request for Review should be denied. *See DPI Secuprint, Inc.*, 362 NLRB No. 172 at * 6 (2015) (no overwhelming community of interest despite common supervision, functional integration, same benefits, and similar pay rates); *DTG Operations, Inc.*, 357 NLRB No. 175 at *4 (2011) (no overwhelming community of interest despite common supervision, functional integration, and similar benefits and base wages); *Macy's*, 361 NLRB No. 4 at *15 (2014) (no overwhelming community of interest despite the fact that excluded employees were subject to the same handbook, were evaluated based on the same criteria, were subject to the same dispute-resolution procedure, received the same benefits, used the same entrance, and used the same clocking system). If anything, the facts showing a rational basis in support of a unit of all maintenance employees are even stronger here. Moreover, the complete absence of a collective bargaining history at the Chattanooga facility further supports the maintenance only unit.

c. Under long established Board precedent prior to *Specialty Healthcare*, the petitioned-for maintenance unit is an appropriate unit

As explained, the petitioned-for maintenance unit is appropriate under *Specialty Healthcare* and the Regional Director correctly so found. His finding is also wholly consistent with longstanding Board precedent under which the petitioned-for unit would be found appropriate.

In *American Cyanamid Co*., 131 NLRB 909 (1961), the Board set forth its policy that separately petitioned-for maintenance units are to be found appropriate where the facts of the case demonstrate the absence of a more comprehensive bargaining history and that the petitioned-for maintenance employees have the requisite community of interest. In *American Cyanamid*, the Board found a maintenance-only unit appropriate where maintenance had not "lost its identity as a function separate from production" and maintenance employees "were readily identifiable as a group." *Id*. at 910. The Board relied on the fact that maintenance workers had their own supervision and performed functions requiring particular job skills that were distinct from the functions and skills of production workers. *Id*.

Similarly, in *Capri Sun, Inc*., 330 NLRB 1124 (2000), the Board found a separate unit of maintenance employees to constitute an appropriate bargaining unit over the employer's objections. The reasons for the Board's decision included: 1) there was separate supervision for the maintenance department,; 2) the maintenance employees were more skilled than the production employees; 3) maintenance employees received a substantially higher rate of pay than production employees; 4) the hiring qualifications for maintenance employees was higher than those required for production employees; 5) maintenance employees were subject to different schedules than production employees; and 6) the absence of temporary interchange between production and maintenance employees. *Id*. at 1124-27. The Board was unpersuaded by

commonalities urged by the employer, including that a number of production employees were permanently transferred to maintenance positions, and that some production employees performed some routine preventative maintenance on weekends. *Id.* at 1125. The Board also rejected opposition to the unit based on the fact that production employees interacted with and assisted maintenance employees.

Also, in *Ore-Ida Foods,* 313 NLRB 1015 (1994), the Board found a maintenance-only unit appropriate where maintenance employees had their own supervisors and there was no evidence that production supervisors had the authority to discipline or to effectively recommend discipline of maintenance employees. *Id.* at 1019. Moreover, in finding the maintenance-only unit appropriate, the Board emphasized the fact that "[t]he maintenance employees are … highly skilled" and "their wages are clustered at the two highest wage rates paid by the Employer." *Id.* The Board found the maintenance-only unit appropriate despite the fact that production and maintenance employees "shared wage rates, fringe benefits, and conditions of employment with the production employees." *Id.*. Further, the Board found that there was no significant temporary interchange between production and maintenance employees, and that any maintenance-type work done by production employees entailed "'lending a hand' to the maintenance employees." *Id.* at 1020. In *Ore-Ida,* the Board found the maintenance unit appropriate despite certain minor commonalities between maintenance and production employees, such as the fact that they were subject to the same terms and conditions of employment and that there were some permanent transfers. *Id*. at 1020-21. *See also United Operations, Inc.* 338 NLRB 123, 125 (2002) (similarity of supervision, personnel policies, and work rules insufficient to negate the propriety of a separate unit); *Sundor Brands, Inc.*, 334 NLRB 755, 756 (2001) (finding maintenance unit appropriate - despite fact that there was no separate maintenance department - based on "(1) the

employees' specialized skills relating to the maintenance of plant equipment; (2) their responsibility for doing maintenance tasks; (3) the fact that they spend some part of the working day in the maintenance shop; (4) their frequent interaction with each other; (5) their relatively high rates of pay; and (6) their separate supervision when performing maintenance work."); *Yuengling Brewing Company*, 333 NLRB 892, 893-94 (2001) (maintenance unit appropriate despite some overlapping functions performed by production and maintenance employees involving unskilled work, where maintenance employees performed all major repairs and received higher wages); *Phillips Products Co.*, 234 NLRB 323 (1978) (finding a unit of maintenance and repair employees appropriate despite minor assistance, and the performance of minor machine maintenance, by operators, where "basically the production employees do not perform skilled maintenance work and the maintenance employees do not engage in production" and the maintenance positions commanded the highest wages among the hourly employee positions).

The above cases demonstrate that under the Board's longstanding pre-*Specialty Healthcare* precedent, the petitioned-for maintenance unit at the Employer's Chattanooga plant is appropriate because, most notably, the Employer's production employees do not have the specialized skill and training to perform the job functions of maintenance employees. That is clearly demonstrated in the record evidence, which shows no meaningful temporary interchange between maintenance and production employees. Simply put, the production employees do not perform skilled maintenance work and the maintenance employees do not perform production tasks. Moreover, maintenance employees are subject to direct supervision by maintenance supervisors, receive greater pay than production workers, work different hours and take separate breaks, have different work areas in the plant, have separate job titles, have heightened

qualifications for hiring, receive more technical and specialized training, wear different uniforms and clothing; have access to tools and parts, attend separate meetings, carry radios, have their own assigned Human Resources Representative, are assigned a company email address; and have access to computers throughout the plant. Based on all of this, the Union submits that it is clear that the maintenance employees share a community of interest and are a distinct group under the Board's longstanding and still valid pre-*Specialty Healthcare* precedent. Furthermore, as the Board found in *Capri Sun* and *Ore-Ida Foods*, the minor commonalities between maintenance and production employees, such as fringe benefits and even some permanent interchange, do not justify finding a petitioned-for maintenance unit inappropriate.

Moreover, the pre-*Specialty Healthcare* cases where the Board has rejected petitions for separate maintenance units are distinguishable. Typically, in those cases, there is a significant degree of overlap of functions among employees and substantial temporary interchange. For example, in *TDK Ferrites Corp.,* 345 NLRB 1006 (2004), certain maintenance employees spent a portion of their workweek operating production equipment. Some of the employees in the petitioned-for unit also relieved production workers and were supervised by production employees. *Id*. at 1007.

In *Buckhorn, Inc.*, 343 NLRB 201 (2004), the maintenance employees performed the same work as production employees during a mold changing process, regularly assisted employees in the warehouse, filled in for production employees, and were sometimes supervised by the shift production supervisor. *Id*. at 203-04. Thus, there was not a wide disparity in skill level between the maintenance employees and the production employees.

By contrast, there is no evidence here of temporary interchange. The record evidence clearly shows that maintenance and production employees do not fill-in for each other. (DD&E

at 10; Tr. 195). The Employer claims that it plans to implement a program that would train production workers in the assembly shop to perform minor tasks on certain machines, but this has not occurred and it is clearly too speculative a claim to require a combined unit. (DD&E at 10). There is also no evidence of common direct supervision. Maintenance employees report to a maintenance supervisor and an assistant manager over maintenance who do not supervise production employees. (Tr. 274).

Finally, the record evidence clearly demonstrates the absence of any common bargaining history for maintenance and production employees. It is undisputed that there has been no collective bargaining at the Chattanooga plant. (Tr. 160). As conceded at the hearing, the discussions held under the COE policy have not been collective bargaining, as reflected in the express terms of the COE Policy itself. Nor is there any formal grievance procedure in place. Under no construction of Board precedent could this COE experience, including Local 42's participation in the COE policy, constitute a "more comprehensive bargaining history." (Tr. 160-161). Cf., *Manufacturing Woodworkers Ass'n*, 194 NLRB 1122, 1123 (1972) (the Board held that a history of collective bargaining on a "members only" basis did not provide an adequate basis for determining the appropriateness of a bargaining unit, since the "Board has traditionally refused to give weight to such a bargaining history").

Nor, contrary to the Employer's argument, does the COE experience constitute evidence of an overwhelming community of interests. It is true that Local 42 has members in both groups, and that it earlier sought to represent the combined unit through participation in an NLRB election with respect to the same. But those facts in no way constitute a "bargaining history" or detract from the readily identifiable grouping of the maintenance workers and the appropriateness and rational basis of their separate unit.

Furthermore, the fact that Local 42 previously participated in an Employer-filed RM election for a combined unit and lost the election does not preclude the Union from now seeking a maintenance only unit. *Macy's,* 361 NLRB at fn. 30. (DD&E at 17). It is well settled that there is more than one way in which employees of a given employer may be appropriately grouped. See *NLRB v. Lake Country Assn. for Retarded*, 156 LRRM 2891, 2895 (7th Cir. 1997)("The same company may include several or even many communities of interest.") A proposed unit need only be an appropriate unit and "not necessarily *the* single most appropriate unit." *American Hospital Assn.*, 499 U.S. at 610.

Based on the foregoing, the Union submits that the petitioned-for unit is appropriate under well-established pre-*Specialty Healthcare* precedent upholding maintenance-only units.

d. The petitioned-for unit is not "fractured" under Board law

The Regional Director correctly found that the petitioned-for maintenance unit is not "fractured." (DD&E at 19-20). While the Employer made this argument at the hearing, it has not renewed it in its Request for Review. Accordingly, the argument is waived. Nonetheless, it is clear that the unit is not fractured. The unit includes all maintenance employees at the Chattanooga facility. Moreover, the unit sought is many times larger than the median size of bargaining units certified by the Board.[2]

The Board has held that "[a] petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit." *Specialty Healthcare*, 357 NLRB at 18. For example, in *Odwalla, Inc*., 357 NLRB No. 132 (2011), the Board rejected the proposed unit which excluded a job classification titled merchandisers, finding the petitioned-for

[2] See data available on the Board's website at https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections. (Median size between FY '05 and '14 ranged from 23 to 28.)

unit did not follow any lines drawn by the employer, such as job classification or job function. The Board found "no rational basis" for excluding the merchandisers from the unit because no community of interest factors suggested that the employees in the petitioned-for unit shared a community of interest that the merchandisers did not also share. *Id.* at * 5. The merchandisers shared "very similar" functions with two of the included classifications in the proposed unit. *Id.* At the same time, the petitioned-for unit included refurbishment center cooler technicians, who worked in a functionally and structurally separate part of the business, under separate supervision, from the rest of the included employees. *Id.* at * 2, 5. Hence, the Board found that the grouping of classifications in the petitioned-for unit was arbitrary.

The Employer incorrectly argues that the facts present here are similar to those in *The Neiman Marcus Group, Inc. (Bergdorf Goodman),* 361 NLRB No. 11 (2014). In *Bergdorf Goodman*, the Board found inappropriate the petitioned-for unit of shoe sales associates in two separate store departments, because it did not track any departmental or organizational lines drawn by the employer. *Id*. at *5. The Board explained that while the "petition's departure from any aspect of the [e]mployer's organizational structure might be mitigated or outweighed by other community-of-interest factors," there were "no such facts" present in that case. *Id*. at *4. The Board relied on the fact the petitioned-for employees did "not share any specialized skills or training." *Id*. at fn. 5. Thus, in *Bergdorf Goodman*, the union attempted to create a unit from two distinct classes of employees that ran against the job classifications created by the employer, and who did not share any job skills or specialized training. The facts here are quite different. Indeed, the job skills of the maintenance employees are a crucial component of what makes the petitioned-for unit readily identifiable and distinct. The maintenance employees are the highly skilled workers in the plant, and are thus absolutely distinguishable from the production

employees, whose jobs do not require specialized skill. Moreover, the Union has petitioned for all maintenance employees in the plant, not any sub-group of maintenance employees, such as maintenance employees from one or two shops. Here the Union seeks to represent all of the maintenance employees, who - as discussed in detail above - share a clear community of interest.

In addition, prior to *Specialty Healthcare*, in *Peterson/Puritan Inc.*, 240 NLRB 1051 (1979), the union sought to represent only a small portion of the employer's maintenance employees – the unskilled line mechanics. The Board rejected the proposed unit, finding that the line mechanics "perform duties which are an integral part of the production process, and do not possess a high level of skills." *Id.* at 1051. Also, in *Chromalloy Photographic*, 234 NLRB 1046 (1978), the Board found that a proposed unit of only the camera repair and maintenance employees was inappropriate. The Board reasoned that because the skills levels of the camera repair and maintenance employees did not differ greatly from that of other employees, they did not possess a community of interest separate and apart from the excluded production and maintenance employees sufficient to warrant a finding that they constitute a separate unit. *Id.* at 1047.

Here, the petitioned-for unit is clearly not a fractured unit. The Union seeks to represent all of the Employer's maintenance employees. Local 42 did not petition for a mere portion or sub-group of the maintenance employees. This matter is plainly distinguishable from the above Board decisions that rejected fractured units. As explained in the Regional Director's Decision, the maintenance employees include in the petitioned-for unit "share a unique function…Maintenance employees share a job title and perform distinct functions – they all perform preventative maintenance and repairs. While they may work on different machines once they are assigned to a department, they all shared common initial hiring criteria and training.

They undergo separate ongoing training and sometimes train with employees assigned to other shops. Maintenance employees in the body weld and paint shops work an identical schedule to provide maintenance coverage around the clock, seven days a week. While maintenance employees in the assembly shop work a different schedule, they still provide coverage around the clock five days per week. All maintenance employees work at times when production employees are not working and they are all required to work on days and weeks when the plant is shut down." (DD&E at 20). Thus there is clearly a rational basis for including all maintenance employees in the petitioned for unit, and for excluding production employees. Furthermore, pursuant to the test articulated in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), which was endorsed by the Board in *Specialty Healthcare*, the community of interest factors of the production employees and the petitioned for unit employees clearly do not "overlap almost completely." *Id.* at 422. The employees in the petitioned-for unit have different skill levels, training, and working hours than the production employees. In addition, there is no evidence in the record of any temporary interchange between production and maintenance employees. Thus, it also cannot be said that there is no legitimate basis for excluding the production employees from the petitioned for unit. Accordingly, the Union submits that the Regional Director correctly found that the "[a]lthough the Employer's contentions may establish that the broader [combined] unit sought by the Employer is an appropriate unit, they are insufficient to establish that production employees share such an overwhelming community of interest as to require their inclusion in the unit." (DD&E at 23).

IV. Conclusion

For the foregoing reasons, the Union respectfully submits that the Employer's Request for Review should be denied without any further delay so that these employees may at last be

assured “the fullest freedom in exercising the rights guaranteed by this Act,” the rights to self organization and to engage in collective bargaining. Basic fairness and respect calls for no less. In addition, the Union opposes the Employer’s request to stay the certification in this case, and its request for oral argument, because the Employer has failed to make a showing that a stay or an oral argument, much less Review, is necessary or appropriate under the particular circumstances of this case.

Dated this 24th day of December, 2015

By: */s/ Michael B. Schoenfeld*

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2015, I submitted the foregoing **PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW** to the National Labor Relations Board by electronic filing and e-mailed a copy of the same to the Regional Director for NLRB Region 10 and counsel for the Employer:

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